IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23/08/2002

Coram

THE HON'BLE MR.JUSTICE E.PADMANABHAN

WRIT PETITION No.21034 of 2002 and WRIT PETITION No.21035 OF 2002
AND
WPMP Nos:29077 and 29078 and WVMP Nos:838 and 839 OF 2002

Rebekka Thomas ..Petitioner
in WP.21034/2002
Padma Noel ..Petitioner
in WP.21035/2002

-Vs-

South India Union of Seventh Day Adventists
Higher Secondary School
rep. By its Secretary Daniel Devadhas
197, GST Road, Vandalur, Chennai-48 .. Respondents
in both WPS

For petitioner :: Mr.C.P.Siva Mohan

For respondents:: Mr.N.A.K.Sharma

Writ petitions are filed under Art.226 of The Constitution of India
praying for the issue of a writ of certiorari, as stated therein.

:O R D E R

In W.P.No:21034 of 2002, the petitioner Rebekko Thomas has prayed for the issue of a writ of certiorari calling for the records o the respondent pertaining to the transfer Order dated 7.6.2002 issued by the respondent and quash the same as illegal, unsustainable in law and against all principles of natural justice.

2. According to the petitioner she was appointed as a English teacher in the respondent school on 20.7.1978 temporarily to begin with and thereafter regularised. It is stated that no agreement was entered into between the respondent and the petitioner at the time of appointment in respect of the service conditions. The Tamil Nadu Recognised Private Schools (Regulation)

Act 1973, came into force. The petitioenr is working as a Teacher in SDA School, Vepery since 1978. The respondent is a minority institution and an aided one. The respondent has not stipulated conditions of service for teachers in accordance with Section 19 of the said Act read with Rule 15 and Form VII-A of the Rules. In the absence of terms and conditions providing for transfer of the petitioner, the respondent has no authority to transfer the petitioner from SDA School at Vepery to SDA School at Panruti. The educational authorities have not recognised the corporate management of the respondent school. The respondent has no power or authority to transfer the petitioner by the impugned order. It is the claim of the petitioner that she has been appointed to the School at Vepery and she cannot be transferred from the said school. By the impugned order of transfer dated 7.6.2002, the petitioner has been transferred from SDA School Vepery to SDA School Panruti in the same post as Teacher. The said order of transfer is being challenged as illegal, without jurisdiction and in the absence of any stipulation in the agreement, the petitioner cannot be transferred from one school to another school under the same respondent management. The learned counsel for the petitioner also relied upon the Full Bench judgment of this court reported in 1998 (III) MLJ 595 and contended that the respondent has no inherent power to transfer the petitioner. The petitioner has also given certain family circumstances and dislocation which the petitioner may have to suffer, if the order of transfer is given effect to. Pending the writ petition, the writ petitioner prayed for stay of the impugned proceedings and on 17.6.2002, interim order of stay was granted for a period of three weeks pending the writ petition.

3. Writ Petition No.21035 of 2002 has been filed by another teacher Mrs.Padma Noel praying for the issue of a writ of certiorari to call for the order of transfer dated 7.6.2002 passed by the respondent as illegal, unsustainable, against the princip of natural justice. According to the petitioner she was appointed as a Tamil Teacher temporarily on 19.6.1973 for for a period of two years and her services were regularised later. The petitioner is handling third standard as of today. It is the claim of the petitioner that no agreement has been entered between the petitioner and the respondent stipulating service conditions so as to enable the respondent to transfer the petitioner. This petitioner's contention is also identical to the petitioner in Writ petition No.21034 of 2002, excepting the small variation in date of appointment and the personal particulars and qualification. In this writ petition also interim stay has been granted pending the writ petition.

4. The respondent management filed WVMP Nos.838 and 389 of 2002 to vacate the order of interim stay passed in both the writ petitions. When the said petitions came up for orders, with the consent of counsel for either side, both the writ petitions were taken up for final disposal.

5. According to the respondent, the petitioner in both the writ petitions are not entitled to any relief in these writ petitions and there are no merits. According to the respondent, the respondent South India Union of Seventh Day Adventist Board of Education has established numerous unaided

minority schools in South India. The respondent has established 64 such schools in Tamil Nadu and Pondicherry employing over 2000 teaching staff. The schools are administered/managed by the Board of Education. In the school at Vepery the petitioner is employed as a teacher. The said school is an unaided minority matriculation school. It is pointed out that the order of transfer has been passed by the South India Union of Seventh Day Adventist Board of Education having its office at No.197, GST Road, Vandalur, Chennai-48 and without impleading the said authority, the petitioner has impleaded the school represented by the Secretary and therefore the writ petitions are bad for nonjoinder of necessary and proper party. It is incorrect to state that the respondent-school is an aided school while factually the respondent is an unaided religious minority school. It is contended that the respondent is not amenable to the jurisdiction of this court under Article 226.

6. The respondent further contends that the wit petitions are not maintainable and invocation of the jurisdiction under Article 226 is an abuse. The claim of the petitioners that they are not transferable from one school to another school cannot be sustained. In fact the petitioner herself admitted that her initial appointment in 1978 was at SDA School at Panthanamthitta and she was subsequently transferred to SDA School, Vepery during the year 1979 with continuity of service. The petitioner having herself come on transfer from one school to another school is estopped from contending that the respondent has no authority or jurisdiction to transfer her. The petitioner has failed to implead the authority who had passed the order of transfer. It is incorrect to state that no agreement has been entered into between the petitioner and the respondent. It is the specific case of the respondent that the respondent has the authority and jurisdiction to transfer the petitioner or other teachers from one school to another school run by the respondent as common seniority is maintained and there is no loss or reduction in salary, nor the service of the Teacher is interrupted.

7. It is further contended that the Employees Hand Book of the SDA Schools provides for a transfer of teacher appointed by the said South India Union of Seventh Day Adventists Board of Education and it also provides for payment of transfer allowance. Therefore the transfer is valid, nor it is violative of the Tamil Nadu Recognised Private School (Regulation) Act, 1973. The petitioner has already been relieved from SDA School Vepery on 13.6.202 and she has to report at SDA School, Panrutti on 17.6.2002. At that stage, the present writ petition has been moved and interim orders have been passed. It is contended that the Full Bench judgment in 1998 (III) MLJ, 592 has no application to the facts of the case. It is also pointed out by the respondent that numerous transfer orders are being passed from time to time from one school to another school established by the said South India Union of Seventh Day Adventists Board of Education and the averment to the contra are false. The school at Panrutti is also a large school ant the respondent has got the authority and jurisdiction to transfer the petitioner and no interference is called for with the order of transfer.

8. In W.P.No: 21035 of 2002, the same contentions have been reiterated by the respondent, and the difference being that the petitioner in the second writ petition was appointed at Madras and continuing her services

at Madras right through. In both the writ petitions common arguments were advanced by the counsel for the petitioner as well as the respondent. Hence, by this common order, both the writ petitions are being disposed of.

9. The points that arise for consideration are:-

"(i) Whether the impugned order of transfer impugned in W.P.No:21034 of 2002 is liable to be quashed as one passed without authority or jurisdiction and violative of the provisions of the Tamil Nadu (Recognised) Private Schools (Regulation) Act, 1973?
"(ii) Whether the impugned order of transfer passed in W.P.No:21035 of 2002 is liable to be quashed as one passed without authority or jurisdiction and violative of the provisions of the Tamil Nadu (Recognised) Private Schools (Regulation) Act, 1973?"

10. Both the points could be considered together. It is admitted at the hearing by Mr.C.P.Siva Mohan, the learned counsel for the petitioners that the respondent school is an unaided minority private schools established by the South India Union of Seventh Day Adventists Board of Education. It is also admitted that neither the said Board nor the Schools established by the Board are receiving grant. The orders of appointment it is admitted, has been issued by the South India Union of Seventh Day Adventists Board of Education by its Secretary. It is further admitted that as seen from the amended Employee Hand Book, whenever appointment of a Teacher or non teaching teacher is made, in the appointment order it is provided that the appointment is subject to the Rules of the Organisation outlined in the Employee' s Hand Book. In fact few of the appointment orders in respect of the teachers employed in the schools were placed before the Court. It is also brought to the notice of the court that the said Board has transferred teachers from one school to another school throughout the State and it is admitted that it is the usual annual exercise of practice.

11. Admittedly the respondent as well as the Board of Management a religious minority has established the Matriculation Schools, and being religious Minority schools, the provisions of the Tamil Nadu Private Schools (Regulation) Act, 1973 with respect to service of teachers namely Section 19 has no application. The respondent being a matriculation school, the provisions The Tamil Nadu Private Schools (Regulation) Act applies in this respect will have no application.

12. That apart, being a Matriculation School, the school is governed by the provisions of the Code of Regulations for Matriculation Schools. It is the case of Mr.C.P.Sivamohan that in respect of service conditions, no agreement has been entered between the petitioners in both the writ petitions and the respondent and therefore the petitioner in each writ petition cannot be transferred. This contention do not deserve any further consideration as the very appointment of the petitioners is subject to the regulations namely the Rules and Regulation of Seventh Day Adventists Organisation's Employee Hand Book. Though a feeble attempt was made that the Hand Book produced by the counsel for the respondent is of the year 1988 and the petitioners have been appointed earlier and the provisions contained in the Hand Book has no

application. This cannot be sustained at all.

13. It is pointed out by Mr.N.A.K.Sharma, learned counsel for the respondent that it is a 1988 Edition and even before that the very same regulations were in force and being continued. This court called upon the counsel for the respondent to file a specific affidavit as to whether the respondent is a Matriculation School and as to whether a common seniority is being maintained in respect of all the schools established by the said Board. Accordingly, an additional counter affidavit has been filed. As seen from the additional counter affidavit, the South India Union of Seventh Day Adventists Board of Education has established numerous unaided minority schools in the State of Tamil Nadu and Union Territory of Pondicherry.

14. All the Schools are Matriculation Schools and they were granted recognition in terms of the Code of Regulations applicable to Matriculation Schools. It has been stated in the affidavit that for the purpose of promotion to the post of Headmaster/Headmistress, the qualified teachers are considered and promoted subject to fulfilling other conditions on the basis of common seniority.

15. It is further stated that on transfer from one school to another school a teacher will not lose his/her seniority or entitlement to be considered to the promotion if the teacher is otherwise eligible. In other words, it is clear that a common seniority is maintained in respect of all the 64 matriculation schools established and run by the said Board.

16. A perusal of the Employee Hand Book would show that the said Hand Book provides for transfer. Paragraph 34 provides for transfer. Paragraph 40 provides for payment of transfer expenses and train fare for the teacher and family members in case of transfer, besides lumpsum allowance as well as freight package allowance. Paragraph 39 of the Hand Book specifically provides for transfer of all teachers employed in the schools established by the said Board and it further provides that transfer is to be considered as an incident of service. The very appointment of petitioner is as per the said Regulations of Hand Book.

17. The learned counsel for the respondent would not controvert the fact that the respondent is following the Hand Book in respect of all the 64 matriculation schools in the State and every year number of transfer of teachers are effected from one matriculation school to another matriculation school. So also while effecting promotion to the cadre of Headmaster, common seniority is maintained. Therefore it is clear that the respondent has the authority to transfer the petitioners in both the petitions as it has been established that the transfer is incident of service.

18. The learned counsel for the respondent relied upon the decision of P.SATHASIVAM,J., rendered in W.P.No:197 of 1993 (Tamil Nadu Matriculation and CBSE School Teachers' Association Vs. State of Tamil Nadu and others), where the validity of the Regulation framed by the State Government for Matriculation Schools has been upheld. But in this case as already pointed out the Hand Book subject to which the appointments of the petitioners and

other teachers have been made,the petitioners are liable to be transferred from one matriculation school to another matriculation school established by the very Board and transfer is an incident of service.

19. The learned counsel for the writ petitioners relied upon the Full Bench Judgement of this court in The Correspondent, Malankara Syrian Catholic School Marthandam Vs. J.Rabinson Jacob and others, reported in 1998 (II) MLJ, 595 where the Full Bench held that transfer is not necessarily included in the conditions of service as a term of the condition of service, unless it is expressly or impliedly provided for. The Full Bench held thus:-

"26. From the resume of the observations made above, it can be safely concluded that transfer is not necessarily included in the conditions of service as a term of the conditions of service, Transfer is a specie of the appointment and being one of the modes of appointment, cannot be included in the appointment itself unless it is expressly or impliedly provided for. Thus the assumption that the power to transfer is included in the power of appointment is unsustainable. Power to transfer involving the cessation of appointment would depend upon the nature of the transaction involved. May be in peculiar facts where it does not bring about any alterations of the conditions of service, change of master, change of place, alteration in the terms of appointment, usage prevalent in the statutory provisions,l rules and regulations and structure, duration of employment and various other circumstances may provide for a lead that it is an incident of service. The question whether it is an incident of service has to be determined in the facts and circumstances of each and every case and it is a question of fact.

30. As observed in the earlier part of the judgment, in view of the facts and circumstances of this case, transfer cannot be termed as an incident of service especially when it is neither specifically provided for in the contract nor in the rules and regulations nor in the conditions of service applicable to teachers and others in private schools. No express provisions for transfer is needed when it cannot be read into it. Rather the appointment condition i.e., one has to become junior most teacher on being transferred in terms of the contract. Consequently, Question No.1 is answered in the negative i.e., right to transfer always depends on innumerable facts, incapable of itemised."

20. In the present case as seen from the Hand Book a specific provision has been made not only for transfer of Teachers from one matriculation school to another matriculation school established by the Board, but also for payment of transfer allowance and other allowances. Thus it is made out by the respondent that in respect of the teachers employed in the schools established by the South India Seventh Day Adventists Higher Secondary Schools, transfer is an incident of service as agreed to and provided for and the contention to the contra advanced by Mr.C.P.Sivamohan cannot be sustained.

21. The very fact that innumerable transfers are being ordered every year as seen from the material papers placed before the court, and the fact that common seniority is maintained and from the common seniority promotion to the post of Headmaster/Headmistress is being effected, it is clear that for

all the Teachers employed in all the 64 Matriculation Schools transfer has been prescribed as an incident of service. The order of transfer impugned in both the writ petitions are not liable to be interfered.

22. Unfortunately, the petitioners in both the writ petition have not chosen to implead the authority who has passed the impugned order of transfer, namely the South India Union of Seventh Day Adventist Board of Education and instead impleaded the school alone. This is also fatal. However,on this score, this court is not dismissing the writ petition on the said technical objection.

23. It is clear that the petitioner in each of the writ petition is liable to be transferred from one school to another school established by the said Board of Education as transfer being an incident of service as stipulated by the Employee Hand Book and admittedly common seniority is being maintained for all purposes including for the purpose of promotion to the post of Headmaster as well as retrenchment. Accordingly, this court holds that there are no merits in both the writ petitions.

24. In the result, both the writ petitions are dismissed, but without costs. Consequently connected WPMPs and WVMPs are also dismissed.

Index: Yes
Internet: Yes
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23-08-2002

E.PADMANABHAN,J.

Order in
W.P.Nos.21034 and 21035 of 2002